SUPREME COURT, U. S.

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MICHAEL RODAK, JR

Nos. 73-1380, 73-1666, 73-1667

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

THE CHEMEHUEVI TRIBE OF INDIANS ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

ARIZONA PUBLIC SERVICE COMPANY ET AL., *Petitioners,*

v.

THE CHEMEHUEVI TRIBE OF INDIANS ET AL., *Respondents.*

FEDERAL POWER COMMISSION, *Petitioner,*

v.

THE CHEMEHUEVI TRIBE OF INDIANS ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE MONTANA POWER COMPANY, PACIFIC POWER & LIGHT COMPANY, PORTLAND GENERAL ELECTRIC COMPANY, PUGET SOUND POWER & LIGHT COMPANY, AND THE WASHINGTON WATER POWER COMPANY, AS AMICI CURIAE

(The names and addresses of Counsel appear on the inside cover.)

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BRIEF FOR THE MONTANA POWER COMPANY, PACIFIC POWER & LIGHT COMPANY, PORTLAND GENERAL ELECTRIC COMPANY, PUGET SOUND POWER & LIGHT COMPANY, AND THE WASHINGTON WATER POWER COMPANY, AS AMICI CURIAE

The Montana Power Company, Pacific Power & Light Company, Portland General Electric Company, Puget Sound Power & Light Company, and The Wash-

ington Water Power Company file this brief as amici curiae, pursuant to Rule 42 of the Court and with the consents of all the parties.

INTEREST OF THE AMICI CURIAE

The five amici are investor-owned electric utilities and are together the principal suppliers of electric energy for commercial, industrial, and residential purposes throughout the Northwest, serving parts of Montana, Wyoming, Idaho, Washington, California, Nevada, and Oregon. To meet the growing need for electrical energy in the Northwest, these utilities have jointly commenced construction of a coal-fired steam electric generating project at Colstrip, Montana, in the eastern part of the state and about thirty-five miles south of the Yellowstone River at Forsythe, Montana. The Colstrip project, which will ultimately have four generating units with a total capacity of 2100 mw, will use cooling water from the Yellowstone diverted pursuant to an appropriative right under Montana law. The first two units of the Colstrip project are now being constructed jointly by two of the amici and are scheduled to begin operation in 1975. The remaining two units will be built by all the amici and are scheduled to commence operation in 1978 and 1979. Fuel for the project will be supplied by a nearby coal mine operated by a subsidiary of one of the amici.

The interest of the amici in the instant proceedings is twofold. First, the Buffalo Rapids Irrigation Project, Custer Rod & Gun Club, Tongue-Yellowstone Beet Growers, and Trout Unlimited (hereinafter together "Buffalo Rapids") have jointly filed a complaint with the Federal Power Commission to require the amici to obtain a license from the Commission for

the Colstrip project under Section 4(e) of the Federal Power Act, 41 Stat. 1065 (1920), *as amended*, 16 U.S.C. § 797(e). That proceeding thus raises in the Commission the issues now pending before this Court respecting the construction of Section 4(e) of the Act. Second, Buffalo Rapids has filed an amicus brief in this Court in which it argues that the projected use of Yellowstone water for the Colstrip and other projects demonstrates the need for reading the Act broadly enough to embrace steam plants within the Commission's licensing jurisdiction.

The arguments based upon the relevant statutory language, legislative history, and the precedents in support of the position of the Solicitor General and of the Arizona Public Service Company et al. have been adequately presented in the briefs of those parties. We shall therefore simply note our agreement in general with those arguments and with the position that Congress in enacting Section 4(e) of the Act did not intend that the Commission embrace steam electric generating plants within its licensing jurisdiction. We shall, however, respond to the *ad hominem* arguments made by Buffalo Rapids, because those arguments erroneously are based on unsupportable factual assertions about the Colstrip project of these amici.

ARGUMENT

The central contention of Buffalo Rapids throughout its brief is that although the legislative history of the Act "seems to focus on the *hydroelectric* basis for the development of the" Act, the Court should give a broad reading to the Act "to provide for a *comprehensive* scheme of water development vis-a-vis power production" (Br. at 10; emphasis in original). With-

out this broad reading, argues Buffalo Rapids, there will be no adequate federal regulation of steam power plants using water from rivers such as the Yellowstone; and corporations like the amici, by exercising state appropriative rights, will "pirate" these waters and "dewater" rivers like the Yellowstone "with the stroke of the pen" (*e.g.* Br. at 9, 14-16). The example Buffalo Rapids offers the Court in support of the foregoing position is the use of Yellowstone water by the amici for the Colstrip project, allegedly by way of "a different factual perspective" from the use of Colorado River water by the "Four Corners plants" (Br. at 2-3).

We show in this brief that Buffalo Rapids' "factual" charges are untrue and sharply disputed. The Court has no record before it respecting the Yellowstone which would lend any support for a reading of the Act so broad as to embrace the licensing of steam plants. The analogy to the Colstrip project is not apt, both because of the very small amounts of water involved as compared with the flow of the river and with uses other than for power generation, and because of the extensive federal and state regulation and environmental review to which the Colstrip project is subject apart from FPC licensing.

1. We agree with Buffalo Rapids as to the need for "factual perspective", especially respecting the charges made about the Colstrip project and the alleged "dewatering" of the Yellowstone River by the amici. The facts are that the average annual flow of the Yellowstone into the Missouri River, just east of the Montana border in North Dakota, is about 9 million

acre feet.[1] This is net of all depletions—municipal, agricultural, and industrial. At normal operation, which will not be reached at least until some time in 1979, the Colstrip project will divert from the Yellowstone for consumptive use about 30,000 acre feet per year, or only about one-third of one percent of the river's present average annual flow.[2] That miniscule diversion for Colstrip should be contrasted with the average annual diversion for agricultural purposes by Buffalo Rapids. During the period from 1966 to 1971 Buffalo Rapids and three other reclamation projects diverted annually an average of 424,000 acre feet —

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[1] Calculations of the amount flowing into the Missouri differ. One measures the average annual flow from 1911-1970 at Sidney, Montana, a few miles downstream from the North Dakota border, at 12,980 cfs, or about 9.4 million acre feet. Ecological Consulting Service, *Report to the Montana Power Company: A Study of the Effects of Water Withdrawal From the Yellowstone River,* Table IX at 39 (1974) ("Data taken from Water Resources for Montana, Part I. USDI, USGS, 1961-1971"). The Bureau of Reclamation's *Appraisal Report on Montana-Wyoming Aqueducts* (1972), p. 3, estimates that the "[a]verage annual discharge into the Missouri River is about 8.8 million acre-feet". For these purposes we accept the estimate of Montana Governor Judge in a statement relied upon by Buffalo Rapids (Br. at 6) as to "a near annual flow of about 9 million acre feet of water at our border."

[2] The annual consumptive use for Colstrip of about 30,000—out of 9 million—acre feet assumes normal operations at 80% of capacity. The diversion will be pursuant to an appropriative right claimed and to be perfected under Montana law, and no water will be purchased from the United States. Given the small amount of water to be diverted and the fact that state regulatory authorities will require the project to be equipped with a storage pond capable of supplying the plant's requirements for nearly two months, the Colstrip diversion will not be dependent upon the regulation of the stream flow by a government dam. Thus, there is no support for the allegation by Buffalo Rapids (Br. at 8) that the amici will use "surplus water" from a government dam within the meaning of Section 4(e) of the Act.

nearly fifteen times that calculated for Colstrip.[3] The average annual diversion during that period by the Buffalo Rapids irrigation project alone was 84,561 acre feet.[4] Under the doctrine of prior appropriation applicable in Montana, these agricultural uses are fully protected against the Colstrip or any other subsequent use.

These circumstances illustrate, first, the fact that the Colstrip diversion will not have any significant impact on the flow of the Yellowstone — and no impact at all on existing uses. These circumstances also demonstrate that FPC licensing jurisdiction over steam plants will not itself give the federal government comprehensive authority to regulate the use of water from the Yellowstone or any other river. Moreover, in addition to the demands for water for reclamation-agricultural projects, there are significant additional demands for industrial, municipal, recreational, and agricultural uses which would not be covered by FPC licensing jurisdiction over steam plants.

Beyond the Colstrip project, there is no evidence before the Court or otherwise available of which we are aware giving any meaningful estimate of the future demands on the Yellowstone of the magnitude complained of by Buffalo Rapids. The Colstrip project is the only steam generating plant currently under construction which will use water from the Yellowstone River system. In making its sensational allegations concerning potential uses, Buffalo Rapids relies

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[3] Ecological Consulting Service, *supra* n. 1, Table VII at 35 ("Data taken from Crop Production Summary, Federal Reclamation Projects—Region 6. USDI, Bureau of Reclamation, 1966-72").

[4] See n. 3 above.

(Br. at 2-3) on figures for "potential" electric power development in a multi-state area from the "North Central Power Study," a joint federal-industry study which was not continued after its first exploratory phase. It is clear even from its description by Buffalo Rapids, however, that that Study did not attempt to estimate what development would ultimately take place. Rather, the primary focus of the Study was simply to identify locations within a five-state area where sufficient strippable coal reserves and water supply could be made available to support generating plants of 1000 mw or more.[5]

The other sources relied upon by Buffalo Rapids (Br. at 3-5) are equally hypothetical. They clearly rely either upon the North Central Power Study (see Br. at 3) or upon the Bureau of Reclamation's *Appraisal Report on Montana-Wyoming Aqueducts* (1972) (see Br. at 5). That report, also the first phase of a study project whose funding was not continued, only "identifie[d] water resources . . . that may be available for development" of coal resources in the Northern Great Plains states "to convey water from sources to points of possible use" (*Report,* Cover Letter of the Project Director, April 1972). The report assumed, without investigation of its own, a maximum ultimate demand of 2.6 million acre feet per year — an assumption based upon certain contracts giving options to purchase water in the future from the Bureau of Reclamation, "indicated interest" in additional water by "[e]nergy companies", and the "recently completed power study" discussed above (*Report* at 11). The report concluded, nevertheless,

[5] See, *e.g.*, North Central Power Study, *Report of Phase I* at 11 (October 1971).

that even "in the driest year," and "after meeting all existing water uses and after having supplied potential industrial water needs," "there will be ample water to meet future municipal and agricultural needs" (*Report* at 31).[6]

Buffalo Rapids points to a number of "options" and "applications" for the purchase of Yellowstone water from Bureau of Reclamation dams for industrial uses referred to in the foregoing *Appraisal Report* (Br. at 5, 6). But in making its charges that the river will be "dewatered" as a result, Buffalo Rapids assumes that all such options and applications will be exercised or granted to the maximum extent. In 1967 the Department of Interior began entering into option contracts for the sale of water stored behind Bureau of Reclamation dams in the Yellowstone and Missouri River systems, and several applications for additional option contracts have been filed but not granted. However, in papers filed by the Department of Interior within the last few weeks in litigation in the District of Columbia, it was revealed that no such option contracts have been entered into since 1971; that "[n]o water has been released pursuant to [these] options or contracts" dating back to 1967; and that "no applications for release of water pursuant to options or contracts" are now pending.[7] Moreover, it cannot

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[6] The report noted that an "environmental impact statement as required by the National Environmental Policy Act of 1969 will be prepared prior to initiating feasibility investigations" *Report* at 30).

[7] Affidavit of William W. Lyons, Deputy Under Secretary of the Department of Interior at 5; Answers of Defendant Rogers C. B. Morton, Secretary of Interior, to Plaintiffs' Revised Supplemental Interrogatories to Federal Defendants, Nos. 27, 28 (November 1974), *Sierra Club Et Al.* v. *Rogers C. B. Morton Et Al.*, Civil Action No. 1182-73 (D. D.C.), *appeal pending,* No. 74-1389 (D.C Cir.).

be determined from an application or claim (by contract or appropriation) for an amount of water how much water will ultimately be put to beneficial consumptive use. For example, the initial appropriation claim filed under Montana law for the Colstrip project was for 181,000 acre feet of water per year, but the total annual consumptive use now projected for the entire Colstrip project will only be about 30,000 acre feet. It cannot be assumed that other so-called estimates of future water claims upon the Yellowstone of the kind relied upon by Buffalo Rapids will not prove similarly greater than original "safe" estimates.[8]

In short, the facts regarding the Colstrip project do not support Buffalo Rapids' extravagant claim that a broad reading of Section 4(e) of the Act is necessary to prevent a "dewatering" of the Yellowstone. The Court should not be asked to base its construction of an Act of Congress on unproven and untrue assertions that "corporations" are about to "pirate" the Yellowstone and "dewater" that river.

2. Nor is a strained reading of the Act to provide the FPC licensing jurisdiction necessary to prevent "the uncontrolled exhaustion of the region's water resources," as Buffalo Rapids claims (Br. at 16). The Buffalo Rapids brief asserts that unless this Court gives licensing jurisdiction to the Commission "a private utility can, without any Federal guidance or control whatever, pirate massive amounts of water

[8] The Notice of Appropriation by the United States for the Buffalo Rapids reclamation project, Dawson County, Montana Docket No. 193324, dated June 17, 1938, was for 1,340 cfs from the Yellowstone system, or approximately 970,830 acre feet per year, more than ten times the average annual diversion of 84,561 acre feet for that project some thirty years later.

from public streams" (Br. at 15), and that "waterways" like the Yellowstone, "dewatered at the *laissez-faire* whim of the corporations, cry out for some scheme of comprehensive Federal regulation" (Br. at 14). But the claim that there will be no adequate regulation if the Commission does not regulate disregards the pervasive federal and state regulation and environmental review of every phase of the Colstrip project, the example Buffalo Rapids proffers for the Court's attention.

To be sure, there is no other federal licensing jurisdiction over the siting *per se* of steam power plants. However, because of the "checkerboard" arrangement of federal and privately owned lands in the Great Plains and in Montana in particular, federal regulation, with environmental review, is pervasive. Thus, the federal approvals which the owners of the Colstrip project either have sought or will seek include permits for the construction of transmission lines across federal lands, the granting of new mining leases of federally owned coal necessary to provide fuel for later stages of the project, and approval of mining plans. Each of these approvals by the Departments of Interior or Agriculture will require an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act, 83 Stat. 853 (1970), 42 U.S.C. § 4332(2)(C), and that impact statement will take into consideration the essential features of the project and their impacts, if any, upon the relevant environment. Indeed, the Bureau of Land Management of the Department of the Interior and the Forest Service of the Department of Agriculture have already commenced the preparation of an environmental impact statement under NEPA respecting these

and other aspects of the Colstrip project; and the Deputy Under Secretary of Interior has directed that the impact "statement should cover the powerplant, its transmission line, the water pipeline, the coal mine, and any related ancillary facilities and rights-of-way."[9] And, should application ever be made to the Bureau of Reclamation by the developers of Colstrip or any other industrial project for actual purchase and delivery of water, Interior has made it clear[10] that an environmental impact statement will be required under NEPA in each instance.[11]

Additional legislation for regulation and environmental review by the State of Montana covers every aspect of the Colstrip project. The Montana Environmental Policy Act, R.C.M. 1947, §§ 69-6501 *ff.*, is virtually identical to NEPA on the federal level and applies to all state actions with respect to the construction of a power plant and all associated facilities, as well as all coal mining activties. Under the Montana Utility Siting Act of 1973, R.C.M. 1947, §§ 70-801 *ff.*, no power facility may be constructed or

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[9] Memorandum to the Director, Bureau of Land Management, from William W. Lyons, Deputy Under Secretary, U.S. Department of Interior (February 22, 1974).

[10] Letter from Martin H. Oleson, Jr., Acting Regional Director, Bureau of Reclamation, U.S. Department of Interior, to all holders of option contracts under the Industrial Water Marketing Program (May 20, 1971).

[11] Buffalo Rapids suggests the possibility of further federal regulation in the form of inclusion of a "part of the Yellowstone River . . . under the Wild and Scenic Rivers Act," 82 Stat. 906 (1968), 16 U.S.C. §§ 1271 *ff.* (Br. at 9). As Buffalo Rapids' brief itself reveals, however, the portion of the river under study reaches "from Gardiner to Pompey's Pillar in Montana" and is no closer than forty miles upstream from the amici's point of diversion.

operated in Montana without a certificate of environmental compatibility and public need by the Montana Board of Natural Resources and Conservation. Applications under this act are now pending for permission to construct the second phase of the generating plant, two 500 kv transmission lines, and a pipeline to carry water from the Yellowstone River to Colstrip.[12] A six-volume draft environmental impact statement respecting these applications has been prepared pursant to "MEPA",[13] and some nineteen public meetings have been scheduled.[14]

The Montana Board of Natural Resources and Conservation has already passed upon applications by the amici under the Siting Act to construct the facilities necessary to divert water from the Yellowstone for use in connection with the first phase of the generating plant, including the construction of a water pumping station, water pipeline, and power transmission line from the river to Colstrip (Order of March 1, 1974).[15]

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[12] The construction of the generating plant itself for the first phase of the Colstrip project was commenced prior to the enactment of the Siting Act and is therefore not covered by that Act. However, as the discussion in the text discloses, the associated facilities and environmental equipment necessary for the operation of even this first phase are covered by the Siting Act.

[13] Montana Department of Natural Resources and Conservation, *Draft Environmental Impact Statement on Colstrip Electric Generating Units 3 & 4, 500 Kilovolt Transmission Lines and Associated Facilities* (November 1974).

[14] Letter announcement of the Montana Dept. Nat. Res. & Cons. (October 10, 1974).

[15] Thus, Buffalo Rapids asserts incorrectly (Br. at 6) that the Montana legislature has passed a "3-year moratorium on water diversions from the Yellowstone River." The statute suspends the granting of new permits for appropriations for three years *or* until "a final determination of existing rights has been made"

The action taken by the state with regard to these facilities was preceded by an environmental impact statement as required by "MEPA".[16] A similar application by the amici for a transmission line from Colstrip to Broadview, Montana was considered and approved by the Board of Natural Resources and Conservation (Order and Certificate of November 15, 1974), and the Board had before it an environmental impact statement as to this portion of the project also.[17]

Moreover, the Montana Utility Siting Act, R.C.M. 1947, §§ 70-801 *ff.*, requires the State Department of Health and Environmental Sciences to certify that a proposed power facility will not violate established state and federal air and water anti-pollution standards. The first phase of the Colstrip generating plant has been so certified by that Department (Permit No. 513-111472, April 23, 1973) after the preparation of an environmental impact statement which assessed all the various water and air pollution control equipment with which the Colstrip project is to be equipped.[18]

All mining operations associated with the Colstrip project are governed by the Montana Strip Mined Coal Conservation Act, R.C.M. 1947, §§ 50-1401 *ff.*, which

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under the state's new Montana Water Use Act (R.C.M. 1947, §§ 89-8-103 *ff*). Moreover, the Act "does not apply to applications to appropriate water for use by a utility facility for which a certificate of environmental compatibility and public need is granted pursuant to the Montana Utility Siting Act of 1973" (R.C.M. 1947, § 89-8-109), as is the case with the proposed diversion for the Colstrip project.

[16] Issued by the Mont. Dept. Nat. Res. & Cons. in January 1974.

[17] Issued by the Mont. Dept. Nat. Res. & Cons. in June 1974, with an addendum in October 1974.

[18] Issued by the Mont. Dept. Health & Env. Sciences in March 1973.

requires approval of mining plans on an annual basis by the Montana Department of State Lands. Finally, the Colstrip mining operations are also governed by the Montana Strip Mining and Reclamation Act, R.C.M. 1947, §§ 50-1034 *ff*. That Act may well be the strictest mining reclamation law in the United States and requires a mining operator to submit reclamation plans for approval and to post a bond that all acreage disturbed by strip mining is to be successfully reclaimed.[19] And, all approvals of mining and reclamation permits under these statutes must also be accompanied by environmental impact statements under "MEPA".

Whatever may be the case in other river basins, then, the state and federal regulation respecting steam power plants in Montana which draw water from the Yellowstone River or its tributaries is pervasive. Accordingly, there simply is no substance to Buffalo Rapids' argument that this Court should read the Federal Power Act broadly on the ground that without FPC licensing jurisdiction there will be no adequate regulation.

CONCLUSION

There is nothing in the record of this case or in the arguments of counsel for Buffalo Rapids which would warrant stretching Section 4(e) of the Federal Power Act in the fashion urged by the Chemehuevi Tribe and by Buffalo Rapids. The dimensions of future develop-

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[19] Surface Mining Permit No. 00003, issued on December 17, 1973 by the Department of State Lands to the Western Energy Company, a subsidiary of one of the amici operating at Colstrip, requires a bond of $2,796,860 for reclamation of the acres currently being mined.

ment of steam electric generating plants in the Yellowstone River system cannot be predicted at this time, but the facts regarding the Colstrip project clearly do not support Buffalo Rapids' argument in favor of FPC jurisdiction. Instead, they demonstrate the absence of any need for such a strained reading of the statute. A project that will divert only one-third of one percent of the average annual flow of the Yellowstone River and which has been and will be scrutinized in virtually every detail by agencies of both federal and state governments, surely cannot accurately be said to demonstrate that the nation's rivers either are "being dewatered" "with a stroke of the pen" or "cry out for some scheme of comprehensive Federal regulation" by the Federal Power Commission. Moreover, since the amount of water needed for the project is so small compared with known agricultural, municipal, and other industrial uses, even the strained reading of Section 4(e) of the Act would not confer upon the Commission the authority necessary for a comprehensive regulation of the river. For these and other reasons advanced in the briefs of the Solicitor General and the Arizona Public Service Company et al., the decision of the court of appeals should be affirmed insofar as it held that the "project works" clause of Section 4(e) of the Act does not apply to steam generating plants and reversed insofar as it held that the "surplus water" clause does apply to steam plants. There is no warrant for any other reading of the statute.

Respectfully submitted,

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